

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDUARDO HERNANDEZ-PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Cr. No. 09-2661GT

Cv. No. 12-0195GT

ORDER

On January 23, 2012, Petitioner, Eduardo Hernandez-Perez ("Mr. Hernandez"), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Hernandez requests a two level downward departure based on his status as a deportable alien, which Mr. Hernandez asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Hernandez's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Hernandez's Motion to Modify Sentence is **DENIED**.

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1 First, Mr. Hernandez pled guilty, pursuant to a written plea agreement, to one count of
 2 Deported Alien Found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). In the
 3 written plea agreement, Mr. Hernandez explicitly waived his right to appeal and/or collaterally
 4 attack his conviction or sentence. The Ninth Circuit has long acknowledged that the terms of a plea
 5 agreement are enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996),
 6 *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr. Hernandez expressly waived his statutory right to
 7 appeal or collaterally attack his sentence in his plea agreement, Mr. Hernandez is now precluded
 8 from challenging that sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985
 9 F.2d 1012, 1014 (9th Cir. 1993) (holding that a knowing and voluntary waiver of a statutory right
 10 is enforceable).

11 Moreover, even if Mr. Hernandez had not expressly waived his right to appeal or
 12 collaterally attack his sentence, his petition would still fail. In essence, Mr. Hernandez argues
 13 that because of his status as a deportable alien, he is "ineligible[] for pre-release custody and
 14 minimum security confinement." Mr. Hernandez argues that the Court should grant him a two
 15 level downward departure because of his status. However, Mr. Hernandez's argument that the
 16 Court should depart downward because he is a deportable alien is precluded by statute and
 17 current Ninth Circuit case law. By statute, the Court may depart downward only if there are
 18 "aggravating or mitigating circumstances . . . not adequately taken into consideration by the
 19 Sentencing Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that
 20 the threat of deportation is not a factor that the district court may consider for sentencing
 21 purposes. *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).¹ Accordingly,

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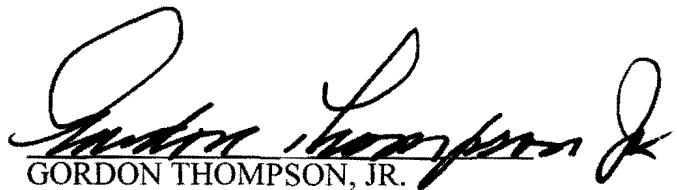
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 26 ¹ The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way
 house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th
 Cir. 1996).

1 **IT IS ORDERED** that Mr. Hernandez's Motion to Modify Sentence is **DENIED**.

2 **IT IS SO ORDERED.**

3
4
5 4/16/13
6 date


GORDON THOMPSON, JR.
United States District Judge

7 cc: AUSA Bruce Castetter

Petitioner